TO:	Zoning Board of Adjustment
FROM:	Community Development Department
DATE:	February 10, 2016
RE:	CASE #AP-16-001
REQUEST:	Appeal the administrative decision that the legal non conforming use at 1200-7th Avenue has been abandoned.
APPLICABLE CODE SECTIONS:	§15.26.030(02) Abandonment of Non-conforming Use
LEGAL DESCRIPTION:	North 63.47' of Lots 14 and 15, all of Lot 16, Block 8, McMahon – Cooper-Jefferis
LOCATION:	1200 - 7th Avenue
APPLICANT/ OWNER:	Tom Lustgraaf, 253 Diamond Trail, San Tan Valley, AZ 85143

BACKGROUND/DISCUSSION– The applicant is requesting an administrative appeal of the decision made by the Community Development Department. Staff determined that the legal non-conforming use of property commonly known as 1200 – 7th Avenue, a/k/a The World Famous Do Rock Inn, as a tavern has been abandoned and is no longer in operation.

The property is zoned R-3/Low Density Multi-Family Residential District and a tavern is not a principle use in the district. The applicant has stated in the application that allowing the tavern at the location is required by law and that the pre-existing non conforming use that existed on the effective date of Chapter 15.26 has never been abandoned. The applicant has provided a case which applies, and has previously provided the case to the City Attorney.

The applicant has indicated that the plan is to operate the property as a tavern with hours of operation, as allowed by law. The number of employees would be approximately 2-5 and the number of people at maximum capacity is 70. The parking access, signage and lighting would be unchanged.

The Community Development Department received letters from the applicant on August 27, 2015 and December 18, 2015 regarding the use of the property. Rose Brown, of the Community Development Department responded on December 22, 2015 with a determination that the legal non-conforming use at the address had been abandoned. An application for an administrative appeal was received on January 19, 2016.

APPLICABLE CODE SECTION:
The following section of Title 15: Zoning of the *Municipal Code* are applicable to this request/review:

Chapter 15.02.020 Zoning Board of Adjustment. The Zoning Board of Adjustment shall have the following powers, pursuant to this Ordinance:

C. To hear and make final decisions on appeals of any zoning determination.

Chapter 15.26.030(02) Abandonment of Nonconforming Use. If any nonconforming use ceases for a continuous period of more than six months, any subsequent use shall conform to the regulations of this title.

CITY DEPARTMENTS AND UTILITIES – All City departments and local utility providers were notified of the proposed conditional use permit request. The following comments were received:

The Public Works Department, Council Bluffs Water Works and MidAmerican Energy had no comment.

The Community Development Department has the following comment(s).

1. According to the Public Health Department the last valid date of a food service permit at the location was October 10, 2013.
2. The last date of the liquor permit for the premise was July 15, 2013.
3. The only building permit on record for the address in the last ten years includes a permit issued on December 1, 2014 for the repair of the roof of the structure.
4. There was not a valid liquor permit(s) necessary for the operation of a tavern at the location following July 15, 2013. The tavern could not legally be in operation without appropriate permits for serving alcohol.

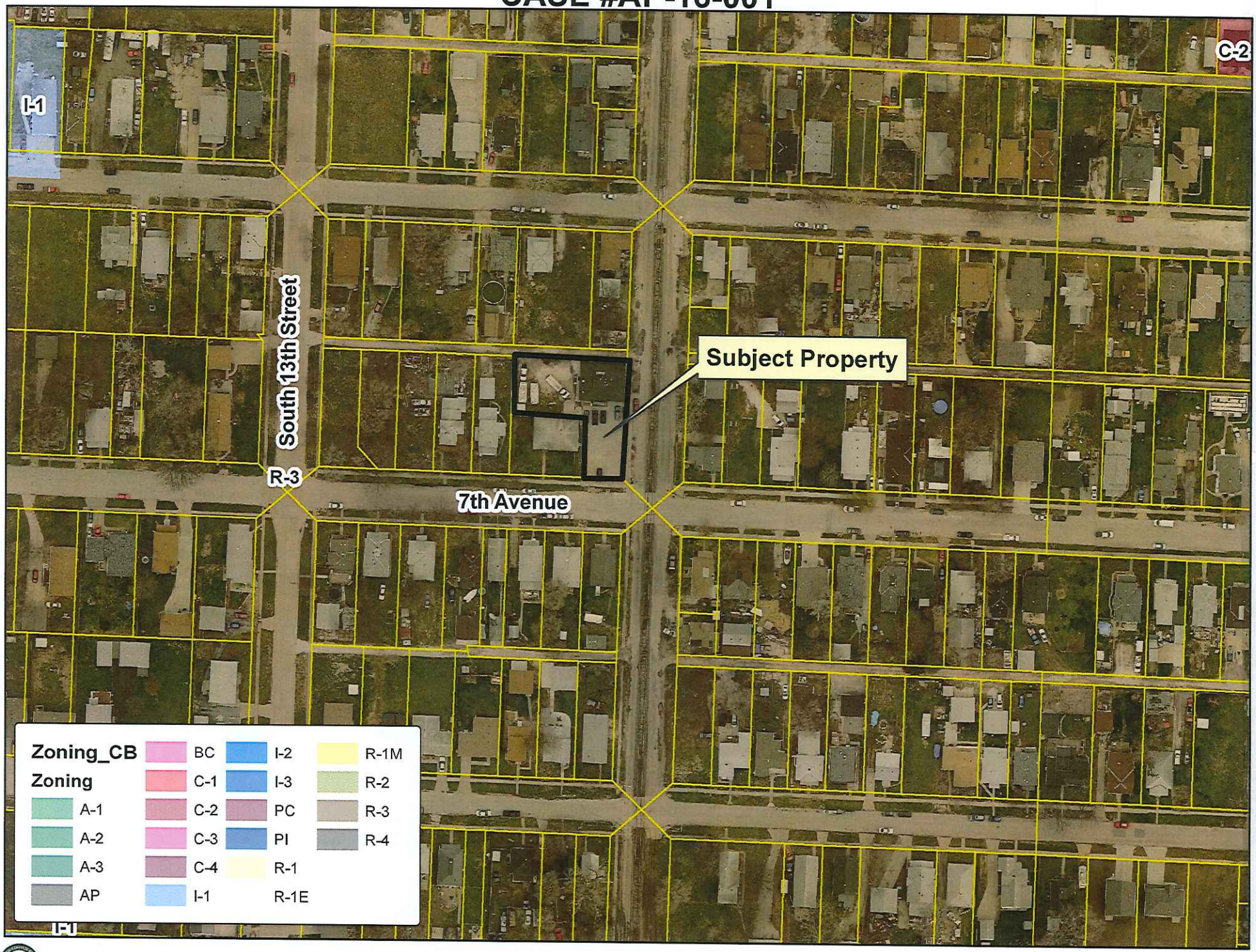
ATTACHMENTS – The following attachments are included with this report for reference purposes:

Attachment A – Location map
Attachment B – Letter from Tom Lustgraaf to Rose Brown, Community Development (received 8/27/2015)
Attachment C – Letter from Tom Lustgraaf to Rose Brown, Community Development (received 12/18/2015)
Attachment D – Letter from Rose Brown, Community Development Department, to Tom Lustgraaf (dated 12/22/2015)
Attachment E – City of Des Moines V. Imperial Properties, submitted by Tom Lustgraaf

RECOMMENDATION
The Community Development Department recommends: 1) denial of the requested administrative appeal for the reasons cited above.

Rose E. Brown
Planning Coordinator

CASE #AP-16-001



ATTACHMENT A

CASE #AP-16-001

THOMAS E. LUSTGRAAF
ATTORNEY AT LAW (Retired)

Thomas E. Lustgraaf
P O Box 1874
Council Bluffs, Iowa
51502-1874
(712) 322-8285 Phone
(712) 256-8739 Fax
Tlustgraaf@cox.net

Community Development Department
ATTN Rose Brown
209 Pearl Street
Council Bluffs, Iowa 51503

RE: 1200 7th Ave

To Whom It May Concern:

I am the owner of 1200 7th Ave in Council Bluffs. I have a signed contract with a party to sell this property. His intent is to reopen the property as a restaurant, which it has been for as long as I can remember and I am 46 years old. He went to apply for a food service permit and was prevented from doing so. The Health Department refused to even accept his application. The reason given was that your department was refusing approval. It has been brought to my attention that your position is that the property has lost the Pre-existing non- conforming use rights. This is incorrect. I have provided a copy of the applicapable case law to the City Attorney Dick Wade. He has informed me that you are still refusing to give the approval that the Health Department claims that it needs from you to even allow an application to be submitted. I take my property rights very seriously and will defend such with every means at my disposal. I have spoken with Attorney Dan Manning and he assures me that I am correct about the Law, and has agreed to represent me in this matter. Please review the case law and give approval to the health department without delay. If after reviewing the applicable law, you still intend to maintain the false claim that the property has lost the pre-existing non-confirming rights, please notify me of your decision and the date that you claim this right was lost. Please be advised that if you don't stop this illegal assault on my property rights, I will be forced to take legal action to recover all losses incurred because of your actions. These will include but not be limited to loss of profits, contractual interference, Attorney fees and all other claims available to me.

Sincerely,

Tom Lustgraaf
ATTORNEY AT LAW (Retired)
P O Box 1874
Council Bluffs, Iowa 51502-1874
(712) 322-8285 Phone
(712) 256-8739 Fax
Tlustgraaf@cox.net
ISBA# 18865

CASE #AP-16-001

ATTACHMENT B

THOMAS E. LUSTGRAAF
ATTORNEY AT LAW (Retired)

Thomas E. Lustgraaf
P O Box 1874
Council Bluffs, Iowa
51502-1874
(712) 322-8285 Phone
(712) 256-8739 Fax
Tlustgraaf@cox.net

Community Development Department
ATTN Rose Brown
209 Pearl Street
Council Bluffs, Iowa 51503

RE: 1200 7th Ave

Rose Brown:

I am the owner of 1200 7th Ave in Council Bluffs as I have stated in my previous letters that have went unanswered. I have spoken to Dick Wade, the City Attorney, and requested some action from the city. He instructed me to send another letter asking you to answer the following questions:

1) Does the property at 1200 7th Ave. in Council Bluffs, Iowa 51501 have grandfather rights to operate as a restaurant/lounge?
2) If the answer to question 1 is no, on what date did the property lose said rights?

Please answer as soon as possible. Thank you.

Sincerely,

Tom Lustgraaf
ATTORNEY AT LAW (Retired)
P O Box 1874
Council Bluffs, Iowa 51502-1874
(712) 322-8285 Phone
(712) 256-8739 Fax
Tlustgraaf@cox.net
ISBA# 18865

CASE #AP-16-001

ATTACHMENT C

COMMUNITY DEVELOPMENT
(712) 328-4629

December 22, 2015

Mr. Thomas E. Lustgraaf
P.O. Box 1874
Council Bluffs, IA 51502-1874

Mr. Lustgraaf,

The property commonly known as 1200 – 7th Avenue, Council Bluffs, Iowa, legally described as the north 63.47 feet of Lots 14 and 15, all of Lot 16, Block 8, McMahon, Cooper and Jefferis Addition is zoned R-3/Low Density Multi-Family Residential District.

A restaurant and/or tavern are not principle uses in that district. For zoning purposes the previous tavern was considered a legal, non-conforming use at that location. According to available information the last date of the liquor permit issued for the premise was July 15, 2013. The last date for a valid food service permit was October 10, 2013.

Chapter 15.26.030(02) Nonconforming use, of the Municipal Code states the following, '*Abandonment of Nonconforming Use. If any nonconforming use ceases for a continuous period of more than six months, any subsequent use shall confirm to the regulations of this title*'.

Based on aerial photography it would also appear that the structure is non-conforming because of its placement and proximity to the platted property lines.

A copy of Chapter 15.10 Low Density Multi-family Residential District and Chapter 15.26 Nonconformities is included for your reference.

Sincerely,

Rose E. Brown

Rose E. Brown, AICP
Planning Coordinator

Cc: Richard Wade, City Attorney

Court of Appeals of Iowa.

CITY OF DES MOINES V. IMPERIAL PROPERTIES

698 N.W.2d 336 (Iowa Ct. App. 2005)

CITY OF DES MOINES, Plaintiff-Appellant, v. IMPERIAL PROPERTIES, INC., Defendant-Appellee.

No. 5-088 / 03-0762

Court of Appeals of Iowa.

Filed April 28, 2005

Appeal from the Iowa District Court for Polk County, Robert D. Wilson, Judge.

The City of Des Moines appeals from a district court ruling denying injunctive relief in a zoning enforcement action against Imperial Properties, Inc. **AFFIRMED.**

David L. Phipps, Assistant City Attorney, Des Moines, for appellant.

Robert A. Nading II of Nading Law Firm, Ankeny, for appellee.

Heard by Huitink, P.J., and Miller and Eisenhauer, JJ.

HUITINK, P.J.

The City of Des Moines appeals from a district court ruling denying injunctive relief in a zoning enforcement action against Imperial Properties, Inc.

I. Background Facts and Proceedings.

Imperial owns a commercial building and adjacent parking lot located at 5803 Hickman Road in Des Moines. The property has been zoned C1 commercial since 1965. Since acquiring the property, Imperial has leased it to several restaurant tenants, a conforming use under the 1965 zoning ordinance. Subsequent to adoption of the 1965 zoning ordinance, the City enacted additional site planning and parking lot regulations. Because Imperial's continuing use of its parking lot for a restaurant was "grandfathered" in under the zoning ordinance, Imperial was not required to bring its parking lot into compliance with subsequently enacted site plan and parking lot regulations.

In 1998 Imperial's restaurant tenant vacated the property. The property remained vacant until the fall of 2001 when it was leased to another restaurant tenant. On February 11, 2002, the City issued a certificate of occupancy authorizing the use of the property for a restaurant. The certificate included the following special conditions:

> Special Conditions: 1.) Temporary until 6-1-02 pending landscaping and concrete removal per site plan requirements. DZ/RLK.

According to the City, Imperial's use of the parking lot was no longer a legal nonconforming use because that use was discontinued for more than one year after the 1998 vacancy. Imperial's subsequent use of its parking lot was therefore subject to the City's site plan and parking lot regulations.

On July 8, 2002, a zoning enforcement official issued a "notice of violation" citing Imperial's failure to bring its property into compliance with the City's applicable site plan and parking lot requirements. Although the City claimed a copy of this notice was sent to Imperial's registered agent, Imperial denied its receipt.

CASE #AP-16-001

ATTACHMENT E

On August 29, 2002, the City sued Imperial, alleging Imperial's continued violations of the City's applicable zoning ordinances. The City requested the following relief:

> WHEREFORE, the Plaintiff prays that the Court order the Defendant to bring the land into compliance with the Municipal Code of the City of Des Moines, Iowa, and for other relief deemed equitable by the Court under the circumstances.
>
> FURTHER, the Plaintiff prays that the Defendant be ordered to cause the illegal business activity to cease and the structure be vacated until such time as there has been issued a valid Certificate of Occupancy.
>
> FURTHER, the Plaintiff prays that the Court enjoin the Defendants from their continued nonconforming use of the real estate in violation of the Des Moines, Iowa, Municipal Code, Chapter 134.
>
> FURTHER, the Plaintiff prays that all costs incurred by the Plaintiff in enforcement of the Municipal Code and all costs of this action be assessed to the Defendant as a personal judgment and be entered against the real estate as an assessment, with interest.

Imperial denied any violations and affirmatively alleged that it did not discontinue its legal nonconforming use because the property was leased to another restaurant tenant.

The fighting issue at trial was whether Imperial discontinued the use of its parking lot for a restaurant for the requisite time to lose its legal nonconforming use status. The City presented evidence supporting its earlier recited discontinuation theory, including the fact that one or more abandoned or disabled vehicles were found in the parking lot while the property was vacant. The City also argued that the zoning commission correctly interpreted and applied the pertinent zoning ordinances in making its enforcement decisions.

The trial court disagreed. The court's findings of fact state:

> After reviewing the ordinances, the Court accepts defendant's argument that there has been no change in the underlying use of the property and that defendant is shielded from the subsequent, more restrictive ordinance amendments because of the "grandfather" provision in the ordinance. Nor does the Court find that the owner was somehow bound by the conduct of the tenant when the tenant agreed to submit a site plan.

The Court expressly does not decide the issue of whether defendant may be estopped from asserting the "grandfather" provision. Certain facts suggest that the defendant should be estopped. But the City did not plead that theory nor did the City file a trial brief asserting the theory. Under these circumstances, and in fairness to the defendant, the Court will leave that issue to be decided, if at all, in the future.

On appeal, the City raises the following issues for review:

> I.IMPERIAL PROPERTIES VIOLATED THE CITY'S ZONING ORDINANCE.
>
> II.IMPERIAL WAIVED ITS RIGHT TO CLAIM PERPETUATION OF LEGAL NONCONFORMING USE BY FAILING TO APPEAL THE ZONING ADMINISTRATOR'S DETERMINATION TO THE BOARD OF ADJUSTMENT.

II. Standard of Review.

The pleadings, relief sought, and nature of the case ordinarily determine whether an action is legal or equitable. *Ernst v. Johnson County,* 522 N.W.2d 599, 602 (Iowa 1994). However, we will review a case on appeal in the same manner in which it was tried. *Id.* Where

there is uncertainty about the nature of the case, our litmus test to make the determination is whether the trial court ruled on evidentiary objections. *Id.* Because the district court ruled on evidentiary objections in this case, we find the case was tried at law. Accordingly, our review is for correction of errors of law. Iowa R. App. P. 6.4.

III. The Merits.

The parties agree that Imperial's use of its parking lot was formerly a legal nonconforming use to which the subsequently adopted site plan and parking lot regulations at issue did not apply. As noted earlier, the City contends Imperial's use of its property is no longer legal because it was discontinued after 1998. We disagree.

Des Moines Municipal Code section 134-1352(b) provides:

> If a lawful use of a structure or of a structure and land in combination exists at the effective date of the ordinance adopting or amending this chapter that would not be allowed in the district under the terms of this chapter, the use may be continued so long as it remains otherwise lawful, subject to the following:
>
> . . . .
>
> (5) If a nonconforming use of a structure or structure and land in combination is discontinued, i) for more than two years prior to January 1, 1992; ii) for more than one year between January 1, 1992, and February 1, 2001; or iii) for more than one year for any reason whatsoever after February 1, 2001, the use of such shall thereafter conform to the uses permitted in the district in which it is located.

The term "use" is defined in this chapter to include the words "intended, designed, or arranged to be used or occupied." Des Moines Municipal Code § 134-3.

See 15.03.660

Even though "use" is defined in the Municipal Code to include the words "intended, designed, or arranged to be used or occupied," the Municipal Code makes it clear that this definition applies "except where the context clearly indicates a different meaning." *See* Des Moines Municipal Code § 134-3. A nonconforming use is one "that existed and was lawful when the [zoning] restriction became effective and which has continued to exist since that time." *Perkins v. Madison County Livestock Fair Assoc.*, 613 N.W.2d 264, 270 (Iowa 2000). "A party who asserts a nonconforming use has the burden to establish the lawful and continued existence of the use, and once the preexisting use has been established by a preponderance of the evidence, the burden is on the city to prove a violation of the ordinance by exceeding the established nonconforming use." *City of Jewell Junction v. Cunningham*, 439 N.W.2d 183, 186 (Iowa 1989).

See 15.03.515

Our supreme court has held that "ordinances may effectively extinguish nonconforming uses based solely on discontinuance of that use for a specified period of time." *Smith v. Board of Adjustment*, 460 N.W.2d 854, 857 (Iowa 1990). However, "periods of discontinuance which are caused by circumstances beyond the control of a property owner will not cause the loss of a nonconforming use." *Ernst*, 522 N.W.2d at 604 (stating interruption in use of property caused by decreased demand would not cause loss of nonconforming status even if ordinance did not contain an intent element); *see also City of Minot v. Fisher*, 212 N.W.2d 837, 842 (N.D. 1973) (permitting the continuation of a nonconforming use when owner attempted to find suitable tenant during period on non-occupancy); *Marchese v. Norristown Borough Zoning Bd. of Adjustment*, 277 A.2d 176, 185 n. 9 (Pa.Commw.Ct. 1971) (stating courts have excused involuntary cessation of nonconforming use for financial difficulties of owner and inability of owner to find suitable tenant).

We believe the outcome of this case is controlled by the earlier recited definition of the term "use." There is no evidence of record indicating Imperial's intended

use of its parking lot for a restaurant changed after 1998 or that the design or arrangement of the property for use as a restaurant was changed. Moreover, the record indicates that Imperial continuously offered the property for rent during its vacancy and eventually leased it to a restaurant tenant in the fall of 2001. At best, the evidence establishes no more than an interruption in Imperial's use of the property for a restaurant, pending its eventual lease to another restaurant tenant. The fact that one or more vehicles were parked in the parking lot during this time is, in our view, insufficient to establish Imperial's discontinued legal nonconforming use of its parking lot. *See Perkins,* 613 N.W.2d at 270 (granting latitude to owner when changes in use are not substantial and do not adversely impact the neighborhood). Because there is substantial evidence indicating Imperial did not discontinue its legal nonconforming use of its parking lot, the provisions of section 134-1352(b)(5) are not implicated. The trial court correctly denied the City's request for injunctive relief, and we affirm on this issue.

Finally, we decline to address the City's exhaustion of administrative remedies argument because it was neither raised nor resolved at the district court. *Vincent v. Four M Paper Corp.,* 589 N.W.2d 55, 64 (Iowa 1999) ("We will not address an argument which the district court did not have an opportunity to consider."). We have carefully considered all of the arguments raised by the parties on appeal and conclude they are either without merit or controlled by the foregoing.

AFFIRMED.